

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 4, 2005

IN RE:

BELLSOUTH'S PETITION TO ESTABLISH
GENERIC DOCKET TO CONSIDER
AMENDMENTS TO INTERCONNECTION
AGREEMENTS RESULTING FROM CHANGES
OF LAW

DOCKET NO.
04-00381

ORDER GRANTING PETITION FOR INTERVENTION,
GRANTING PERMISSION TO PRACTICE *PRO HAC VICE*,
AND ESTABLISHING STATUS CONFERENCE DATE

This matter is before the Hearing Officer upon the *Petition of XO Communications, Inc. for Leave to Intervene* ("Intervention Petition"), the *Affidavit of John J. Heitmann for Permission to Practice Pro Hac Vice* ("Pro Hac Vice Petition"), the *Motion to Bifurcate of KMC, NuVox/New South, and Xspedius* ("Motion to Bifurcate"),¹ *BellSouth Telecommunication Inc.'s Response to the Joint Petitioners' Motion to Bifurcate* ("Response to Motion to Bifurcate") and for consideration of other associated motions and pending matters. At a status conference on March 28, 2005, the Hearing Officer considered the pending motions, considered the response and related matters, and set the time for the next status conference.

¹ The motion was filed by KMC Telecom V, Inc. and KMC Telecom III, LLC (together "KMC"), NuVox Communications, Inc on behalf of its operating entities NuVox Communications, Inc and NewSouth Communications Corporation (collectively "NuVox/NewSouth"), and Xspedius Communications, LLC on behalf of its operating subsidiaries, Xspedius Management Co Switched Services, LLC, and Xspedius Management Co of Chattanooga, LLC (collectively "Xspedius")

PETITION TO INTERVENE

XO Communications, Inc. ("XO") filed its *Intervention Petition* on March 11, 2005. XO states that it is duly qualified to do business in Tennessee and holds a certificate of public convenience and necessity authorizing it to provide local and interexchange telecommunications services and to operate as a Competing Telecommunications Service Provider in the State of Tennessee. XO asserts that its legal rights, duties, privileges, immunities, and other legal interests will be affected or determined by the outcome of this proceeding. XO represents that its participation will not impair the interests of justice or the orderly and prompt conduct of the proceeding.

Tenn. Code Ann. § 4-5-310(a) (1998) sets forth the following criteria for granting petitions to intervene:

(a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if:

(1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;

(2) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of the law; and

(3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.

The Hearing Officer applied this legal standard and granted the *Intervention Petition* upon finding that it satisfied the requirements. The *Intervention Petition* was timely and properly filed and served, and it demonstrated that XO's legal interests may be determined in this matter. The Hearing Officer found that allowing XO's intervention will not impair the interests of justice or the orderly and prompt conduct of this matter

PETITION TO APPEAR *PRO HAC VICE*

Mr. Heitmann filed his *Pro Hac Vice* Petition on March 14, 2005. Mr. Heitmann states that he is licensed and in good standing in the District of Columbia and in the State of New York and that no disciplinary actions or investigations are pending against him.² Mr. Heitmann agrees to subject himself to the jurisdiction of the Tennessee Regulatory Authority (“Authority” or “TRA”) in any manner arising out of his conduct in such proceedings and agrees to be bound by the rules governing the conduct of attorneys appearing before the Authority.

This Application complies with Rule 19, Rules of the Tennessee Supreme Court, and Tenn. Comp. R. & Reg. 1220-1-2-.04(7). Accordingly, the request by John J. Heitmann for permission to practice before the Authority in the proceedings in this matter is granted.

MOTIONS TO DISMISS, MOTION TO BIFURCATE, RESPONSE AND RELATED MATTERS

In November and December of 2004, KMC, NuVox/NewSouth and Xspedius (collectively “Joint Arbitration Petitioners”), Competitive Carriers of the South (“CompSouth”), and Southeastern Competitive Carriers’ Association (“SECCA”) all sought dismissal of this docket. On November 22, 2004, the TRA received the *Motion of CompSouth to Dismiss BellSouth’s Petition to Establish Generic Docket*. SECCA notified the TRA on December 7, 2004 that it joined in CompSouth’s motion to dismiss. On December 8, 2004, the TRA received the *Motion to Dismiss of KMC, NuVox/New South, and Xspedius (“Motion to Dismiss”)*.

During the January 10, 2005 Authority Conference, SECCA withdrew its support of the CompSouth motion to dismiss.³ At the status conference on January 31, 2005, CompSouth agreed to withdraw its motion to dismiss as moot. CompSouth had predicated its motion on the lack of a final order from the Federal Communications Commission (“FCC”); subsequently, the FCC had announced that it would be releasing the final order on Friday, February 4, 2005, and the motion

² See Rule 19, Rules of the Tennessee Supreme Court

³ Transcript of Authority Conference, p 36 (January 10, 2005)

therefore had become moot.⁴ During the same conference, the Joint Arbitration Petitioners agreed to restyle their *Motion to Dismiss* into one suggesting bifurcation of the proceedings. SECCA and CompSouth expressed support of the Joint Arbitration Petitioners' motion to the extent it was restyled as a motion to bifurcate.

The Joint Petitioners filed the *Motion to Bifurcate* on March 7, 2005. During a status conference on March 8, 2005, the Hearing Officer accepted the substitution of the *Motion to Bifurcate* in place of the pending *Motion to Dismiss*. On March 28, 2005, BellSouth Telecommunications, Inc. ("BellSouth") filed its *Response to Motion to Bifurcate*.

During the status conference on March 28, 2005, the parties determined that a bifurcation may slow the progress of the docket. Without waiving any rights that may apply through contract or law, the participants agreed to proceed without bifurcation.⁵ The participants will engage in a ninety-day period of negotiation. The ninety days will begin no sooner than March 14, 2005 and may begin later depending on the participants' specific contract provisions. After the negotiation period, the participants will bring unresolved matters before the TRA in this generic docket.

Based on the parties' agreement, the Hearing Officer deemed the pending *Motion to Bifurcate* and the *Response to Motion to Bifurcate* moot. Likewise, any pending motions to dismiss which were converted to motions in support of the bifurcation are moot.

STATUS CONFERENCE


The participants and the Hearing Officer agreed to convene for another status conference on April 18, 2005 immediately following the regularly scheduled Authority Conference beginning at 1:00 p.m. (central).

⁴ Transcript of Status Conference, p. 7 (January 31, 2005)

⁵ In agreeing to proceed, the *Joint Petitioners* specified that they wanted to preserve the arguments from their *Motion to Bifurcate* within the docket file. Those arguments are retained, although the motion itself is moot.

IT IS THEREFORE ORDERED THAT:

1. The *Petition of XO Communications, Inc. for Leave to Intervene* is granted. XO may participate in this proceeding as its interests require and receive copies of any notices, orders or other documents filed herein.
2. John J. Heitmann is authorized to practice *pro hac vice* in this docket, in accordance with the *Affidavit of John J Heitmann for Permission to Practice Pro Hac Vice*.
3. The participants agree to negotiate for a ninety-day period beginning no earlier than March 14, 2005. After the negotiation period, the participants will add the unresolved matters to the issues list in this docket.
4. The participants shall reconvene for another status conference before the Hearing Officer on Monday, April 18, 2005 at 1:00 pm (central).


Deborah Taylor Tate, Director
As Hearing Officer